No. 11868

In the United States Circuit Court of Appeals for the Ninth Circuit

THELMA TIPTON, ET AL., APPELLANTS

v.

BEARL SPROTT COMPANY, INC., A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

WILLIAM S. TYSON,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
FREDERICK U. REEL,
JOSEPH D. MLADINOV,
Attorneys,
United States Department of Labor.

KENNETH C. ROBERTSON,
Regional Attorney.

INDEX

CITATIONS

803751—48——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11868

THELMA TIPTON, ET AL., APPELLANTS

v.

BEARL SPROTT COMPANY, INC., A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Administrator of the Wage and Hour Division, United States Department of Labor, is charged with the duty and responsibility of administering and enforcing the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060; 29 U. S. C., sec. 201 et seq.), hereinafter referred to as "the Act." Since this case presents significant questions concerning the scope of the coverage of the Act, the Administrator, with leave of Court, respectfully submits this brief as *amicus curiae*.

JURISDICTION

This is an appeal from a final judgment (R. 9–10) of the District Court of the United States for the Southern District of California, Central Division, dis-

missing, for failure to state a claim upon which relief could be granted, the third amended complaint of the appellants in an action instituted pursuant to Section 16 (b) of the Act to recover unpaid overtime compensation, an additional equal amount as liquidated damages, and a reasonable attorney's fee.

The district court had jurisdiction of the case under Section 16 (b) of the Act and Section 24 (8) of the Judicial Code (28 U. S. C., sec. 41 (8)). The jurisdiction of this Court over this appeal arises under Section 128 of the Judicial Code (28 U. S. C., sec. 225).

STATEMENT OF THE CASE

Since the case arises on a motion to dismiss the complaint the facts are those stated in the complaint (R. 2–7), and summarized at pages 2–3 of Appellant's Brief.

QUESTIONS PRESENTED

1. Whether employees employed in a cafeteria, located in the plant of an interstate steel manufacturer and serving substantially all the employees of the plant and business visitors, but not open to the general public, are engaged in occupations necessary to the production of goods for interstate commerce within the meaning of the Act.

2. Whether such employees are within the exemption provided by Section 13 (a) (2) of the Act for employees engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

SUMMARY OF ARGUMENT

This Court's decision in *Consolidated Timber Co.* v. *Womack,* 132 F. (2d) 101, is controlling here and requires reversal of the decision below. In *Womack* this Court held that cookhouse employees serving meals to workers producing goods for commerce were employed in an occupation necessary to the production of goods for commerce within the meaning of the Act. The Act was held applicable in *Womack* even though the majority of the employees did not use the cookhouse, and even though the cookhouse served the general public. It follows *a fortiori* that the Act applies here where substantially all the employees patronize the cafeteria which is not open to the general public. Appellee's attempt to distinguish *Womack* as resting on the inaccessibility of other eating places is unsupported by the facts of that case. Equally unsupportable is the attempted distinction that in *Womack* the manufacturer himself operated the cafeteria, for such a distinction between manufacturer and contractor operation has been squarely rejected by the Supreme Court in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, and *Martino* v. *Michigan Window Cleaning Co.,* 327 U. S. 173. Nor can the basic holding of *Womack* that in-plant feeding is "necessary to production" be successfully challenged; it is supported both by subsequent court decisions construing the Act, and by general industrial experience with in-plant feeding facilities. In any event it was error to dismiss the complaint since appellants would be entitled to an opportunity to prove such facts as the relationship between the cafeteria and production.

The argument that the cafeteria is an exempt retail or service establishment is likewise foreclosed by the *Womack* decision, *supra,* as well as by this Court's recent holding in *Coast Van Lines* v. *Armstrong,* 167 F. (2d) 705, both of which recognize that establishments which are not open to the general public are not within the exemption.

ARGUMENT

I

Employees employed in a cafeteria, located in the plant of an interstate steel manufacturer and serving substantially all the employees of the plant but not open to the public, are within the coverage of the Act

This Court in *Consolidated Timber Co.* v. *Womack,* 132 F. (2d) 101, held that employees in a Glenwood, Oregon, cookhouse furnishing meals to loggers producing timber for interstate commerce as well as to members of the general public were engaged in an occupation necessary to the production of goods for interstate commerce within the coverage of the Act. We submit that this Court's decision in the *Womack* case applies *a fortiori* to the facts of the instant case.

A comparison of the facts in the *Womack* case with those in the case at bar discloses that the complaint here alleges facts clearly within the *Womack* rule. Thus, in *Womack* "the court found that the greater proportion of the company employees took their meals elsewhere than at the Glenwood cookhouse" (132 F. (2d) at 103). In the instant case "substantially all the employees" of the plant patronize the cafeteria (R. 4). In *Womack* the facilities were available not

only to the logging employees but also to employees of other companies and to the general public (132 F. (2d) at 103, 106). In the instant case the cafeteria "is open only to employees and business visitors * * * and not to the general public" (R. 4). In the *Womack* case this Court concluded that the work of the cookhouse employees "had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce' " (132 F. (2d) at 106, quoting *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 525–526). We submit that upon the similar, and indeed stronger, facts of this case the same result must follow here.

Appellee seeks to distinguish the *Womack* case on the grounds, first, that the cookhouse in that case was operated by the company which itself produced goods for commerce rather than by an independent contractor, and second, that the cookhouse in the *Womack* case was located in an inaccessible location and not, as in the instant case, in a city with other restaurant facilities. We submit that the first of these attempted distinctions is contrary to well-settled rules as to the coverage of the Act and that the second attempted distinction rests on a theory rejected in the *Womack* decision itself.

Appellee's argument that the *Womack* case is distinguishable because the employer here operates the cafeteria under a contract with the manufacturer whereas in *Womack* the manufacturer operated his

803751—48——2

own cookhouse is contrary to the well-settled rule that the applicability of this Act depends upon the relationship of the employees' duties to production for commerce and not upon whether the employer is himself producing goods for commerce or is rendering service to a producer. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 524; *Martino* v. *Michigan Window Cleaning Co.,* 327 U. S. 173, 177; *Roland Electrical Co.* v. *Walling,* 326 U. S. 657, 664. Squarely in point here is the *Martino* decision holding that employees of a window washing concern were covered by the Act because they were engaged in cleaning factory windows pursuant to a contract between their employer and the manufacturer. Noting that the cleaning of windows was an occupation necessary to the production of goods, the Court stated:

> If the services rendered in this case had been rendered by employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act. Respondent's employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts. [327 U. S. at 176–177.]

Similarly in the instant case employees whose activities are covered by the Act under the *Womack* decision "are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts."

Appellee's contention that the *Womack* decision rests on the inaccessibility of other eating places and

that it is, therefore, inapplicable here because the employees are free to dine elsewhere proceeds, we believe, from a misreading of the *Womack* case. This Court in *Womack* expressly noted that "the greater proportion of the company employees took their meals elsewhere than at the Glenwood cookhouse" (132 F. (2d) at 103). Thus the *Womack* decision itself rejects as a test of coverage whether the employees producing goods for commerce had alternative places to eat. Appelle's "accessibility" argument could have been made with more force in the *Womack* case itself than it can achieve here where "substantially all the employees" patronize the cafeteria (R. 4). As a matter of fact, a contention similar to appellee's was advanced and expressly rejected in *Womack.* Appellee states (brief, p. 12) that if the cafeteria had closed "Presumably more workers would have brought their lunches and the rest would have eaten at nearby restaurants." Cf. *Womack:* "* * * it is of no consequence to argue that the Company might have employed loggers residing in the vicinity who would not be under the necessity of eating at a cookhouse, because *it is not what could have been the fact, but what actually was the fact, upon which the decision must rest"* (132 F. (2d) at 107; italics supplied).[1]

Finally appellee suggests that the employees here are not covered by the Act because their "services

[1] As shown in Point II, *infra*, if the inaccessibility of other eating places were an element necessary to the coverage of these employees, it was nevertheless error to dismiss the complaint because appellants would be entitled to an opportunity to develop at trial the facts with respect to the inaccessibility of other eating places.

are attentions to the personal needs of the workers and must be sharply distinguished from the situation where some service is rendered which contributes in some way to the manufacturing plant and its facilities'' (brief, p. 13). Since, as we have seen, the relation between appellants and the production of goods for commerce is the same as that borne by the employees in the *Womack* case, appellee's contention amounts to little more than an attack on the holding in *Womack* that the furnishing of meals to employees producing goods for commerce is ''necessary to production'' within the meaning of the Act.

Appellee seeks to support this attack on the doctrine of the *Womack* case by citing *McLeod* v. *Threlkeld,* 319 U. S. 491. We submit that the *McLeod* case not only fails to support appellee here but on the contrary indicates Supreme Court approval of the *Womack* rule. In *McLeod,* the Court, dividing 5 to 4, held that a cook for a railroad crew was not ''engaged in commerce.'' But the majority opinion explicitly stated that it was not concerned with the scope of ''production of goods for commerce'' since McLeod's duties were ''completely outside that clause.'' 319 U. S. at 493. Moreover the Court has since made it clear that the *McLeod* case was limited to the scope of ''engaged in commerce'' and in distinguishing *McLeod* stated that ''the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to produce goods for commerce.'' *Armour & Co.* v. *Wantock,* 323 U. S. 126, 131. The clear implication that

the Court would have reached a different result in *McLeod* had the employee there been able to rely on the "necessary to" concept of coverage is further supported by the fact that both the majority and dissenting opinions in *McLeod* cite the *Womack* case with apparent approval. 319 U. S. at 493, 501.[2]

In urging that appellants are not engaged in work "necessary" to production, appellee "would give an unwarranted rigidity to the application of the word 'necessary' which has always been recognized as a word to be harmonized with its context. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 413, 414" (*Armour & Co.* v. *Wantock,* 323 U. S. 126 at 129–130). To establish that an employee is engaged in an "occupation necessary to the production of goods for commerce" the statute "does *not* require that the occupation in which he is employed be *indispensable* to the production under consideration" (*Roland Electrical Co.* v. *Walling,* 326 U. S. 657 at 664; italics by the court). In the instant case the employees

[2] The *Womack* case has been followed by appellate courts both prior and subsequent to the *McLeod* decision. *Hanson* v. *Lagerstrom*, 133 F. (2d) 120 (C. C. A. 8); *Basik* v. *General Motors Corp.*, 311 Mich. 705, 19 N. W. (2d) 142; see also *Ferguson* v. *Prophet Co.*, 6 W. H. Cases 284 (S. D. Ind.). Appellee relies on two lower court decisions to the contrary. *Kuhn* v. *Canteen Food Service Inc.*, 4 W. H. Cases 913 (N. D. Ill.), appeal dismissed for want of final judgment, 150 F. (2d) 55 (C. C. A. 7); *Relander* v. *Mason County Logging Co.*, 2 W. H. Cases 1052 (Superior Ct., Thurston County, Washington). The *Kuhn* case rests in part on the district court decision in *Castaing* v. *Puerto Rican American Sugar Refinery, Inc.*, which had been reversed shortly before the *Kuhn* decision, 145 F. (2d) 403 (C. C. A. 1), and the *Relander* case rests on the district court decision in *Womack*, subsequently reversed in part by this Court.

bear the same "close and immediate tie with the process of production" as the employees in the *Womack* case (132 F. (2d) at 106). That the relationship is in fact "close and immediate" is substantiated by the facts in the instant case and by general industrial experience.

The relationship between the cafeteria workers and the production activities of the steel company is attested not only by the fact that the company has turned over a portion of its plant for the purpose of providing meals for its employees and business visitors, but also by the close control exercised by the steel company over the cafeteria. The steel company owns the greater part of the cafeteria furniture, utensils, kitchen equipment, and tableware. It regulates the hours of operation and the prices charged in the cafeteria, and even the menus offered there, all for the purpose of accommodating the needs and schedules of the steel company's employees (R. 4). The steel company's control over the cafeteria is indicative of its recognition of the relationship between in-plant feeding and efficient operation of productive facilities.

The relationship between in-plant feeding and production is likewise attested by general industrial experience which refutes appellee's assertion that the abandonment of the cafeteria would not "have caused a ripple in the production of Columbia Steel Company" (brief, p. 12). The following excerpts from letters of leading industrial concerns to the War Food Administration emphasize the marked relationship between the existence of in-plant feeding facilities

and increased production:[3] "It has been our experience * * * that there is no single thing * * * which helps [more] to maintain the high rate of production * * * than to operate a good, economical industrial food service" (Philco Corporation). "Our production per man-day is materially greater than was the case prior to our having a cafeteria * * *." (Gay Engineering Company of Los Angeles.) "* * * in-plant feeding is beneficial both from a welfare and production standpoint" (Fleetwing, Division of Kaiser Cargo, Inc.). "The increased production * * * has in great measure been contributed to by in-plant feeding" (Bakewell Aircraft Products Company of Los Angeles). "* * * our cafeteria is a material factor in maintaining production" (Du Pont Company). The experience of these industries with in-plant feeding facilities demonstrates that the maintenance of such facilities is not "merely a comfort and convenience" (appellee's brief, p. 6), and establishes that in their view to eliminate in-plant feeding would "handicap the production" (*Roland Electrical Co.* v. *Walling,* 326 U. S. 657, 664).[4]

---

[3] Extracts from these letters are contained in *Nutrition in Industry*, published by the International Labor Office in 1946. For the convenience of the Court we have reprinted the extracts there contained in the Appendix, *infra.*

[4] Canadian industrial experience is similar. "* * * many industrialists speak of the value of the installation of such [in-plant feeding] facilities as a morale builder and in *increasing the productivity of the workers.* A good midshift meal is known definitely to cut down on the afternoon lag, and thus *production is kept up to a high level.* Midmorning and afternoon break periods with nutritious food available have been found by many to

The relationship between in-plant feeding and production is likewise recognized by Government agencies,[5] by employer organizations,[6] by the food service

---

increase production or keep production at the same level when the work is tedious. * * * It has also been indicated that if an optimal physical condition is to be promoted, and *high per capita production made possible*, management must assume an active responsibility in the matter of worker nutrition. For management to do so is wise self-interest rather than philanthropy * * *." *Nutrition in Industry, supra*, Part I, Nutrition in Canadian Industry, contributed by Lionel Bradley Pett, Ph. D., M. D., Chief of the Division of Nutrition of the Department of National Health and Welfare, Ottawa, pp. 17, 42 [italics supplied].

[5] See *Industrial Feeding in Manufacturing Establishments*, published in 1944 by the United States War Food Administration, which states (p. 1) that the Industrial Feeding Program had as its two fold purpose "(1) to encourage the installation, expansion, and improvement of food service facilities in all plants where industrial feeding is practicable; (2) to assist industrial food services in providing the food needed by workers to maintain and improve health and production efficiency." See also *Plant and Community Facilities and Services Guide*, published by the Bureau of Manpower Utilization, War Manpower Commission (1943), p. 12: "The rate and quality of production * * * is directly influenced by the provision of nutritious food through adequate and accessible eating facilities in the plant and in the community." See also Monthly Labor Review, Volume 7, pp. 218–221, 184 (1918); Volume 16, pp. 1–9 (1923). For the comparable English experience, see Monthly Labor Review, Volume 2, pp. 69–70, 91; Volume 7, pp. 46–47, 53. The English wartime requirement that manufacturing establishments with over 250 employees establish an in-plant industrial feeding unit is contained in Statutory Rules and Orders, 1940, No. 1993 of Vol. II, p. 408. The English practice is summarized in *Canteens in Industry* (published in 1942 by the Industrial Welfare Society) which states (p. 6): "The works canteen has become an accepted and essential part of large-scale industry and few would deny its benefits from the point of view of health, efficiency, and well-being."

[6] As stated by the National Industrial Conference Board, *Industrial Lunch Rooms* (1928), p. 55: "* * * a number of com-

industry,[7] and by experts in industrial management.[8] For the convenience of the Court we have reprinted in the Appendix, *infra,* excerpts from a report of the International Labor Office indicating the widespread recognition of the importance of in-plant feeding to production. Thus general industrial experience as well as the weight of judicial authority fully supports

---

panies that find it urgent to install luncheon facilities for their employees, but impractical to engage in a program of management and finance foreign to their business, deem it advisable to turn the management of their cafeterias over to concessionaires. Reasonable financial loss has not deterred employers from continuing to furnish such luncheon facilities * * *. It is evident, therefore, that the industrial lunchroom is not a profitable undertaking, but this a minor consideration to many who find its advantages heavily outweighing its drawbacks." See also National Association of Manufacturers, *Industrial Health Practices* (1941). Cf. *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173, 176, n. 4.

[7] "If you are a [plant cafeteria] manager in this position [forced to charge high food prices to pay for light, fuel, and rent] try selling the company on the importance of nutrition in its relation to production. Sell the idea of keeping the worker fit * * *." Address of Alberta M. Macfarlane, Educational Director, National Restaurant Association, extracts reprinted in *Nutrition in Industry* (1942), Canadian Department of Pensions and National Health. See also National Restaurant Association News-Letter, Educational Department Bulletin No. 27, May 24, 1945. Cf. *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, 664, n. 2.

[8] "The maintenance of plant restaurants and cafeterias has become almost universal. Even when the neighborhood is blessed with fairly good places to eat, it has come to be regarded as desirable to institute a plant cafeteria. This makes possible not only the development of *esprit de corps* through meeting of fellow workers, but insures that workers will toil through the afternoon hours properly nourished. It is these features that make the restaurant a dividend paying investment." Lansburgh and Spriegel, *Industrial Management* (1940), p. 333; see also National Research Council, *The Food and Nutrition of Industrial*

the conclusion reached by this Court in the *Womack* case that employees who are employed for the purpose of furnishing meals to employees producing goods for commerce are themselves engaged in an occupation necessary to the production of goods for commerce within the meaning of the Fair Labor Standards Act.

II

The issue of coverage should not have been determined adversely to appellants prior to trial

As we have seen the facts alleged in the complaint are sufficient to establish the coverage of the Act under the controlling decisions of the Supreme Court and of this Court. But even under appellee's theory of the law, it was error to dismiss the complaint prior to trial.

It is well-settled that "There is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." *Leimer* v. *State Mutual Life Assur. Co.,* 108 F. (2d) 302, 306 (C. C. A. 8); *Sparks* v. *England,* 113 F. (2d) 579, 582 (C. C. A. 8); accord: *Ware* v. *Travelers Ins.*

Workers in Wartime, First Report of Commission on Nutrition in Industry, No. 110 (1942); Vicary, *Labor Management and Food*, 26 Harvard Business Review 305 (1948); Aspley and Whitmore, *Nutrition Program for Workers*, Industrial Relations Handbook, 1943, pp. 734, et seq.; Haggard and Greenberg, *Diet and Physical Efficiency—Influence of Frequency of Meals Upon Physical Efficiency and Industrial Productivity* (1935); Metropolitan Life Insurance Company Policy Holders Service Bureau, *Lunchrooms for Employees* (1942).

Co., 150 F. (2d) 463, 465 (C. C. A. 9); *Hanney* v. *Franklin Fire Ins. Co.,* 142 F. (2d) 864, 866 (C. C. A. 9); *Carroll* v. *Morrison Hotel Corp.,* 149 F. (2d) 404, 406 (C. C. A. 7); *Koehler* v. *Jacobs,* 138 F. (2d) 440, 443 (C. C. A. 5); *Tahir Erk* v. *Glenn L. Martin Co.,* 116 F. (2d) 865, 870 (C. C. A. 4); *Continental Collieries* v. *Shober,* 130 F. (2d) 631, 635 (C. C. A. 3). This rule is particularly applicable in actions under the Fair Labor Standards Act where the courts have recognized the "special necessity * * * 'for having a detailed knowledge of all pertinent facts relative to the nature of an employer's business and of the work done for him by an employee, before attempting to reach a conclusion as to whether the employee is or is not entitled to the [wage and hour] benefits * * * of the Act.'" *Stratton* v. *Farmers Produce Co.,* 134 F. (2d) 825, 827 (C. C. A. 8); accord: *Musteen* v. *Johnson,* 133 F. (2d) 106, 108 (C. C. A. 8); *DeLoach* v. *Crowley's Inc.,* 128 F. (2d) 378, 380 (C. C. A. 5); *Burton* v. *Zimmerman,* 131 F. (2d) 377 (C. C. A. 4); *Davila* v. *Porto Rico Ry. Power & Light Co.,* 143 F. (2d) 236, 238 (C. C. A. 1); *Castaing* v. *Puerto Rico American Sugar Refinery,* 145 F. (2d) 403 (C. C. A. 1).

In the instant case as we have seen (Point I, *supra*) the complaint alleges facts which establish the coverage of the Act under the *Womack* decision and other decisions of the Supreme Court and of this Court. But even if the limitations which appellee seeks to engraft on those decisions could properly be imposed, appellants would still be entitled to an opportunity to prove the facts which appellee regards as essential

to coverage. For example, although the inaccessibility of other eating places is not an essential element of establishing the applicability of the Act, even if it were an element, appellants would be entitled to go to trial to prove its existence. The "accessibility" of other eating places would depend not only upon the presence in the vicinity of other restaurants (a matter probably not within the scope of judicial notice; see 9 Wigmore on Evidence 547, 548, Sec. 2511 (3d Edition, 1940); *State* v. *Small,* 126 Me. 235, 137 Atl. 398; *City of St. Louis* v. *St. Louis Theater Co.,* 202 Mo. 690, 100 S. W. 627; but cf. appellee's brief, p. 10), but also upon whether any such restaurants were of a type within the means of, and otherwise suitable for, the employees of the plant, whether the employees were permitted to leave the plant to eat and were given sufficient time to do so, and other similar facts. If these matters were relevant as appellee contends, they could be developed at a trial but they need not, and indeed should not, be detailed in a complaint. See Rule 8, Federal Rules of Civil Procedure; *Southern Pacific Co.* v. *Conway,* 115 F. (2d) 746, 750 (C. C. A. 9), and cases cited; *Continental Collieries* v. *Shober,* 130 F. (2d) 631, 635 (C. C. A. 3); *Tahir Erk* v. *Glenn L. Martin Co.,* 116 F. (2d) 865, 870 (C. C. A. 4).

Appellee also vigorously contends that there is no direct relationship between the maintenance of the cafeteria and the production of the steel company. As a matter of law, this contention would appear to be foreclosed by the *Womack* decision and other cases discussed in Point I, *supra.* Insofar as the contention

raises a question of fact, it cannot be resolved on the basis of the pleadings alone. Although the industrial and governmental authorities cited in Point I, *supra,* would appear to be sufficient to establish appellants' case on this point, appellants might wish to introduce the testimony of employees and officials of the Columbia Steel Company on this point or they might wish to introduce expert testimony as was done in *Basik* v. *General Motors Corp.,* 311 Mich. 705, 19 N. W. (2d) 142, which also involved the coverage under the Act of workers in a plant cafeteria. Thus, even under appellee's theory of the law, appellants' complaint stated a claim within the scope of the Act, and should not have been dismissed prior to trial.

III

The plant cafeteria is not a retail or service establishment

Appellee contends (brief, pp. 14–15), that the cafeteria is an exempt retail or service establishment under Section 13 (a) (2) of the Act which exempts from the minimum wage and overtime provisions employees "engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce." This contention, not passed upon by the district court, is foreclosed by the decision of the Supreme Court in *Roland Electrical Co.* v. *Walling,* 326 U. S. 657, 675–678, and by this Court's decisions in *Consolidated Timber Co.* v. *Womack,* 132 F. (2d) 101, and *Coast Van Lines* v. *Armstrong,* 167 F. (2d) 705. Since the cafeteria in this case serves only employees and business visitors and is not open to the general public, it falls outside

the scope of the exemption as construed in the *Roland, Womack,* and *Armstrong* cases. Moreover, even if the cafeteria were a service establishment, the decisions of the Supreme Court and of this Court cast considerable doubt on whether the greater part of the "servicing" would be in intrastate commerce. See *McLeod* v. *Threlkeld,* 319 U. S. 491, 494, n. 6; *Boutell* v. *Walling,* 327 U. S. 463, 467; *Consolidated Timber Co.* v. *Womack,* 132 F. (2d) 101, 107 (C. C. A. 9); see also *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 526; *Roland Electrical Co.* v. *Walling,* 326 U. S. 657, 667; *Martino* v. *Michigan Window Cleaning Co.,* 327 U. S. 173, 177.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

WILLIAM S. TYSON,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
FREDERICK U. REEL,
JOSEPH D. MLADINOV,
Attorneys,
United States Department of Labor.
KENNETH C. ROBERTSON,
Regional Attorney.

AUGUST 1948.

APPENDIX

Extracts from *Nutrition in Industry,* International Labor Office, Montreal, 1946, Part II: "The Wartime Food and Nutrition Programme for Industrial Workers in the United States" contributed by Robert S. Goodhart, M. D., Surgeon (R) USPHS, Chief of the Industrial Feeding Programs Division, Food Distribution Programs Branch, Production and Marketing Administration, U. S. Department of Agriculture, Washington.

III. Wartime Progress in Protecting the Health of Industrial Workers Through Nutritional Measures (Pages 61–63)

In-plant feeding was a common practice in the United States before the war. A report on health practices in industrial establishments, published by the National Association of Manufacturers in the autumn of 1941 [1] indicated that 41 percent of 2,064 manufacturing plants provided lunch rooms for their employees in 1940. A Nation-wide survey of manufacturing plants engaged in war work, conducted by the War Food Administration,[2] showed that, in March 1944, 49 percent had food service facilities. In table I the findings of the two studies are broken down

[1] National Association of Manufacturers: Industrial Health Practices (a Report of a Survey of 2,064 Industrial Establishments) (New York, 1941). (Footnote numbers in this appendix correspond to those in the original report.)

[2] U. S. Department of Agriculture: Industrial Feeding in Manufacturing Establishments, 1944 (a Report of Surveys Conducted by War Food Administration, Office of Distribution) (Washington, D. C., 1944).

according to plant employment sizes. The distribution of plants among the various sizes was similar in the two surveys.

The expansion of in-plant or industrial feeding during the war was actually much greater than it would appear to have been from the figures in table I. In 1939 there were about 7,800,000 workers in manufacturing industries [3] while in 1944, about 16.5 million were so employed.[4] About 75 percent of this number, or 12.6 million, were considered according to the statistics of the War Manpower Commission,[5] to be engaged in war work (page 61).

TABLE I.—*Percentage of manufacturing plants with food services*

Plant employment size	National Association of Manufacturers survey (1940)	War Foods Administration survey (1944)
All sizes	41	49
1–249	25	28
250–499	37	46
500–999	50	63
1,000–1,999	65	----
1,000–2,499	----	80
2,000–over	77	----
2,500–over	----	91

[3] *Ibid.;* See also, U. S. Department of Commerce, Bureau of the Census, Census of Manufacturers, 1939 (Washington, D. C., 1942).

[4] U. S. Department of Labor, Bureau of Labor Statistics; Employment and Payrolls (Washington, D. C., 1945).

[5] U. S. Department of Agriculture, op. cit.

TABLE II.—*Preliminary report on industrial feeding in metropolitan areas.*[1] *Possession of facilities, workers employed and being served midshift meals, food service, operation methods; for plants employing 1,000 or more workers as reported on industrial feeding program permanent record forms.*

[United States and regions, May 1945]

Metropolitan area [2]	Plants				Workers							Food service operation methods			
	Total number with 1,000 or more workers [3]	With facilities		Without facilities	Estimated total in all manufacturing [4]	In plants reporting	In plants with facilities		In plants without facilities	Being served midshift meals		Management	Industrial feeding contractor	Employee operation	Not indicated
		Number	Percent				Number	Percent		Number	Percent				
United States totals (81 areas)	936	780	83.3	156	7,984,300	4,603,300	4,178,800	90.7	424,400	2,194,400	[5] 54.6	232	306	12	230
Northeast region, 29 areas	411	324	78.8	87	3,660,800	1,825,400	1,618,500	88.7	206,800	852,800	54.3	72	124	2	126
Southern region, 12 areas	55	47	85.5	8	361,800	198,100	180,400	91.1	17,700	98,100	55.4	23	13	2	9
Midwest region, 26 areas	351	307	87.5	44	2,792,400	1,667,000	1,538,700	92.3	128,300	887,700	57.7	104	123	6	74
Southwest region, 8 areas	45	37	82.2	8	321,500	293,900	278,700	94.8	15,200	137,200	49.2	14	20	----	3
Western region, 6 areas	74	65	87.8	9	847,800	618,900	562,500	90.9	56,400	218,600	51.5	19	26	2	18

[1] U. S. Department of Agriculture, Industrial Feeding Program permanent record forms, July 1945.

[2] Bureau of Census, U. S. Department of Commerce.

[3] Represents 80 percent of total number of plants of this size in 81 metropolitan areas. Assuming the coverage employment of the larger plants not reporting to be the same as those reporting, i.e., 4,919, the 234 plants not reporting account for 1,151,046 workers. It is probable, however, that the actual employment in these 234 plants was somewhat less.

[4] Based on U. S. Census data, adjusted for June 1944.

[5] Based on total of 4,015,400 workers in plants with facilities. Excludes 163,400 workers in 10 plants in 4 areas because of incomplete data on number being served.

EFFECT OF NUTRITION PROGRAMMES UPON WORKERS' HEALTH, EFFICIENCY, AND PRODUCTIVITY (PAGES 80–84)

* * * * *

The considered opinion of industrialists who have made satisfactory food services available to their employees must carry considerable weight in an appraisal of the value of this practice.

The following quotations are typical of the opinions of industries having experience with good nutrition programs, as expressed in letters to the War Food Administration:

It is my opinion that the food service programme at this plant has been a big factor in the good relationships which exist between the company and its employees, and it has been a contributing factor to the fine morale which prevails here. The fact that a good morale does exist can be substantiated by such things as our absentee rate which is concurrently about 4 per cent and is lower than industry as a whole, and to our knowledge is the lowest absenteeism rate for any of the major plants in this community. Our accident rates are substantially less than the average for industry as a whole or for the food industry itself

GENERAL FOODS CORPORATION.
POST PRODUCTS DIVISION,
Battle Creek, Mich.

It has been our experience and it is our belief that there is no single thing which tends [more] to cut down absenteeism and labour turnover or which helps [more] to maintain the high rate of production through increased morale than to operate a good, economical industrial food service.

PHILCO CORPORATION,
Philadelphia, Pennsylvania.

We are very well satisfied with the results shown since we have installed the cafeteria for our employees here in the plant * * *.

The record has shown that our absenteeism due to sickness has materially decreased. There has been a marked improvement in the morale of the workers. Our production per man-day is materially greater than was the case prior to our having a cafeteria, and we feel this is attributable to the elimination of fatigue resulting from improper midshift meals.

GAY ENGINEERING COMPANY,
Los Angeles, California.

We do not feel that in-plant feeding has too great a bearing on absenteeism and labour turnover, but we do firmly believe that it is important from a morale standpoint; also, hot, nourishing meals reduce fatigue, thereby resulting in increased production * * *.

To summarize, we believe that in-plant feeding is beneficial both from a welfare and production standpoint.

FLEETWINGS, DIVISION OF KAISER CARGO, INCORPORATED,
Bristol, Pennsylvania.

Although we do not have any specific figures relative to the effects of in-plant feeding on absenteeism, labour turnover, increased production, etc., we do feel that a food service for our people is of definite value and we plan to continue and probably expand its facilities after the war.

COLGATE-PALMOLIVE-PEET COMPANY,
Jersey City, New Jersey.

The increased production that we have enjoyed in this plant of 37 percent has in great measure been contributed to by in-plant feeding.

BAKEWELL AIRCRAFT PRODUCTS CO.,
Los Angeles, California.

Because of production difficulties caused by high labor turn over and absenteeism the plant built and equipped a modern cafeteria * * * Labor turnover the month before opening the cafeteria was 12.5 percent and is now down to 5.9 percent six months after the opening. Absenteeism has dropped in the same period from 9 percent to 4 percent.

ISAACSON IRON WORKS,
Seattle, Washington.

* * * * *

We feel that our cafeteria is a material factor in maintaining production, in reducing absenteeism and labor turn over and in maintaining good employee morale and labor relations.

E. I. DU PONT DE NEMOURS & COMPANY,
Pompton Lakes, New Jersey.

While these facilities and nutritious food are subsidized by the company in the amount of between $4 and $5 per employee per year, we feel that this comparatively small loss to the company is compensated many times over by the reduction in absenteeism and accidents, and the improved efficiency and happiness of well-fed workers.

DIAMOND CHAIN AND MANUFACTURING COMPANY,
Indianapolis, Indiana.

The October record of several employee absences established a new low record of 2.6 percent. It is important to note that absenteeism covers all causes * * *.

The number of absences from common illnesses has been reduced to a negligible and very satisfactory percentage. Much of this good record is due to the effectiveness of the continued promotion of our Industrial Nutrition Programme.

SERVELL, INCORPORATED,
Evansville, Indiana.

* * * * *

IV. CONCLUSION (PAGE 105)

The practice of providing industrial workers with an opportunity to obtain meals at their place of employment has grown so much in the United States during the past four years that it is now generally regarded as an integral pattern of American industrial society. At least of equal importance with the increased extent of industrial feeding is the change which has occurred in the concept held by both management and labour regarding its purpose.

Before the war, where industrial feeding did exist, it was customarily regarded merely as a convenience to the employees, as a means of livelihood to some former employee or his family or as a means of obtaining funds for employee recreational activities. At present its importance as a health measure and its relation to employee morale and industrial efficiency are more generally recognized.

U. S. GOVERNMENT PRINTING OFFICE: 1943